NO. 9847

United States
Circuit Court of Appeals
For the Ninth Circuit

A. H. FAVOUR and A. G. BAKER,

Appellants,

vs.

HARRY W. HILL, Receiver of Intermountain Building and Loan Association,

Appellee.

Reply Brief of Appellants

FAVOUR, BAKER & CRAWFORD,

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INDEX

CONTENTS

ADDITONAL AUTHORITIES CITED

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GENERAL STATEMENT IN REPLY

The six statements which Appellee claims in his Abstract of the Case were conclusions of law of the Master, ignore the undisputed facts that the execution sale was void, that Appellee received back the purchased property and has never paid his debt. These alleged conclusions are not supported by the

findings of fact, therefore, and any judgment rejecting the claim, based upon such conclusions, is not supported by the findings.

The Appellee's Brief diverts attention from the ground on which the claim was denied, as stated by the Master (T. R. 18) "The Receiver has refused to allow the claim on the judgment for the reason that it appears to have been satisfied by the Sheriff's sale held pursuant to the execution on the judgment of Margaret Cobb." The Master approved the rejection on this ground. The Brief raises questions which the Receiver did not raise below, as to the proper party and other matters. Appellee did not stipulate as to the Record and did not request additional portions. If he intended to attempt to question any findings and conclusions he should have included such parts, if there were any, showing different facts. But, as the Record here shows, there was no dispute or issue, in the lower court raising objection to the judicially settled point that Appellants were the proper parties to make the claim.

APPELLEE'S POINTS

I

In the last paragraph of his Abstract, in I of his Summary and in A of his Argument, Appellee for the first time contends that Barrett, and not Appellants,

was the party entitled to make this judgment claim against the Receiver.

This question of Barrett's status was decided clearly in Hill v Favour, 84 Pac. (2nd) 577, referred to in the Master's Report. The Arizona Supreme Court held "It is quite clear that Barrett disposed of all interest he may have acquired in the note and mortgage to the appellees (Favour & Baker) and that he can have no further interest in the action."

But even if that Court had not decided the ownership under the assignments which carried the debt, (5 C. J. 944, Par. 119; 34 C. J. 650, Par. 999; Brown v Scott, 25 Cal. 190, 8 Pac. St. Rep.) or by operation of law, the Record in the case at bar is clear. The lower Court found that appellants were assignees of Barrett. After the judgment in the Cobb case was corrected February 28, 1939, Margaret Cobb and R. O. Barrett (as set out in our Sworn Motion That Master Approve Judgment Claim) "thereafter again assigned to A. H. Favour and A. G. Baker the claimants herein, the judgment as corrected; and their claim was filed, based upon said judgment establishing the debt." (T. R. 8). No denial was made of these or any allegations. These were the facts upon which the Special Master clearly found that appellants were the proper claimants. He recognized and manifestly adopted the decision in Hill v Favour. He sets forth (T. R. 16) "The trial court found that the note and mortgage levied upon under the judgment in the Mar-

garet Cobb suit belonged to Favour & Baker, as the assignees of R. O. Barrett . . .", and "Thereafter, in February, 1939, A. H. Favour and A. G. Baker, as assignees of the judgment of Mrs. Margaret Cobb in Cause No. 12971 petitioned the Superior Court . . . ". He also states (T. R. 18 and 19) "The action of the Receiver rejecting the claim of Messrs. Favour & Baker as assignees of the judgment obtained by Margaret Cobb . . . is approved", and "Favour & Baker, as the assignees of Margaret Cobb have exactly the same rights that she assigned to R. O. Barrett, and that he in turn assigned to Messrs. Favour & Baker . . . " Appellee cannot now raise a question on appeal, and this is a justiciable controversy on the issue whether the satisfaction on void sale satisfies the debt of Appellee.

II

In II of his Summary and B of his Argument Appellee refers to the real issue: Does the void satisfaction satisfy the debt of and exonerate the Receiver from payment. Appellee claims caveat emptor applies and argues his version of the law applicable to a *valid* satisfied judgment. These do not apply when a sale is *void.* He has never cited any authority controverting the cases we cite stating clearly the different rule where a sale is void and the *purchaser* (whether judgment creditor or a third party) loses the property and receives nothing.

The remedy suggested, of a multiplicity of suits between various assignees, is not adequate or practical where the sale is void. If Cobb were compelled to pay back she would have no claim, for beside running of limitations, Appellee's case is based upon the insistence that she was through when she was paid (Appellee Brief, page 3, III). Objection of improper remedy was never raised in the record below. Our cited cases show the remedy pursued by appellants is the proper one when the sale is void. Caveat emptor applies only to valid sales, as clearly stated in Copeland v Colorado Bank (Opening Brief).

Appellee's argument is on law that might be applied in case of valid sales, but the equitable rule is different where a sale is void.

III.

In III of his Summary and C of his Argument Appellee argues that it makes no difference whether a sale is valid or void. He says, without citing authority, "Whether Margaret Cobb received the payment at a sheriff's sale subsequently declared void or whether she received the money at home before the sale are immaterial" and "The test is whether or not the judgment creditor has been fully paid." Our cases show clearly that this is not the rule or equitable on sales afterwards declared void. Appellee misreads our cases, when he states they refer simply to situations where a *judgment creditor* receives nothing.

They relate to recovery where the *purchaser* receives nothing because the sale is declared void. Many times the *purchaser* is the *judgment creditor*, but it is the *purchaser* who is protected whether he is judgment creditor or a third person. Public policy, to encourage such sales, requires protection of a purchaser, the more so if he is a third person. Our case of Mahrhoff v Diffenbacher shows that "it makes no difference whether the purchaser is the judgment creditor or not," and this is the fair and logical rule.

In the Davis v Gaines case, discounted by Appellee, the statement we quoted is approved by the United States Supreme Court as the broad principle, where because of irregular sale a debtor gets back his property.

IV.

In IV of his Summary and D of his Argument Appellee seeks to dispose of all reference to the equitable principles of subrogation by claiming these were not presented before. It does not matter whether we refer to the status of the Appellants as assignees or subrogees. Under the facts the principle, that the purchaser at execution sale who because of invalidity of sale does not receive the property he paid for can recover from the debtor, is the same whether there was an assignment or not. A legal subrogation is in effect an assignment by operation of law, and courts

compel assignments if not already made, and considered necessary.

Krotine v Link (Ohio) 173 N. E. at page 414:

> It is admitted . . . that had there been an assignment of this right the assignee could have recovered in his own name. Well, now, subrogation and the rights under subrogation are by assignment by operation of law. Whenever a man pays the debt of another under such circumstances that he is entitled to be subrogated to the creditor's place, he becomes an assignee in law . . . "

American Trust & Savings Bank v Turner (Ala) 80 S. at 178:

> The rule supported by the great weight of authority in America is that, when a party is entitled to subrogation, he is also entitled to have assigned to him every judgment, specialty or other security held by the creditor in respect to the debt, whether or not deemed at law to have been satisfied . . . and is entitled to be substituted in the place of the creditor as to all means and remedies which the creditor possessed to enforce payment of the debt secured from the principal debtor."

Even where there is no assignment and establishment of subrogation is sought, the facts of the case determine whether a party has the right (60 C. J. page 833) The facts in the Record in this case at bar show a clear case for subrogation (if there had been no assignment) of Appellants to the original right of Margaret Cobb to recover her debt due from the Association and Receiver. This claim, to recover the

money, was supported by the right growing out of subrogation, but as assignments had been made transferring the rights Appellants were entitled to under the principle of subrogation, there was no need to ask aid of court to get an assignment under subrogation. (In re Bruce, 158 Fed. at pages 129 and 130).

Although the facts before the Court in this case, in themselves, presented a case for the application of the right growing out of subrogation, still in addition the claim that Appellants were entitled under this right was mentioned to the Special Master in oral argument and also to the Court, which of course are not matters of record. But, it was specifically set out in paragraphs II and IV of Appellants' Petition for Rehearing (T. R. 28 and 29), renewing to the attention of the Court that Appellants "were by law subrogated to the rights of said original holder on her certificate, and judgment, as well as being assignees."

CONCLUSION

In a case of this nature, where a claim is presented to a Receiver, the claimant is subject to the attitude and requirements of the Receiver and to the manner of procedure directed by the Master in presentation of its case where the Receiver had rejected the claim. And where, as here, the requirements are diligently followed, and no objection has been made to the sufficiency or to the showing and no dispute is raised on

the facts and evidence presented by the claimant, it is, we submit, peculiarly a case where this Appellate Court in its review should give favorable consideration to all equitable rights that may be accorded to the claimants. The facts which stand out undisputed show that Appellants paid Margaret Cobb in full, relying on an execution sale afterwards declared void; the property so paid for was restored to the Receiver; Appellants have paid Margaret Cobb the debt owed her by the Receiver, and the Receiver has paid nothing on his debt.

The rejection of the claim places the Receiver in the inequitable position of profiting by the void sale to discharge his debt without any payment by him. The Supreme Court has clearly approved the principle that nothing could be more unjust than to allow a debtor to so profit.

It is respectfully urged that this Court recognize that justice and equitable principles demand that the rejection of the claim in this case be reversed and that it be allowed as a judgment claim, as prayed in the Opening Brief.

FAVOUR, BAKER & CRAWFORD

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